95-132

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
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CLERK

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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QUESTIONS PRESENTED

1. Did this Court, in remanding this case to the District Court, intend to circumscribe the District Court's inherent discretion to allow Appellees to amend their complaint to challenge Appellants' admitted use of race in drawing district lines as a conscious attempt to separate voters by race pursuant to *Shaw v. Reno*, 113 S. Ct. 2816 (1993)?

2. Where Appellees have suffered a cognizable injury as a result of residing in districts that admittedly were drawn on the basis of race, do Appellees have standing to challenge Appellants' apportionment plan in its entirety?

3. Where the Appellant majority members of the Apportionment Board have abdicated their responsibility to the electorate of Ohio to create a lawful redistricting plan, do Appellees, as dissenting members of the Board, have standing to challenge Appellants' plan in its entirety?

4. Where Appellants have admitted that voting district lines were drawn on the basis of race, must the District Court's finding that those racially-based districts violate the Fourteenth Amendment be reversed because the District Court, without the benefit of this Court's holding in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), articulated its test of unconstitutionality as "race as a motivating factor" instead of "race as the predominant factor motivating the legislature's decision"?

5. Does Appellants' unfounded fear of a legal challenge to their reapportionment plan under the Voting Rights Act constitute a compelling state interest justifying Appellants' admitted use of race in drawing district lines?

6. Was the District Court barred from considering the merits of Appellees' complaint by an unrelated decision of the Ohio Supreme Court that did not address the issues presented in Appellees' complaint?

7. Where the opinions and orders appealed from were not accompanied by a judgment entry and have been vacated and replaced by a subsequent opinion, which was accompanied by a judgment entry, is there a final appealable order from which appeal may be taken?

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS R. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

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OPINIONS BELOW

The April 28, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 1a.

The May 9, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 81a.

The May 26, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 82a.

The March 31, 1994 Opinions and Orders of the three-judge District Court have been officially reported at 847 F. Supp. 579 and 157 F.R.D. 36, and also are set forth in Appellants' Appendix at App. 128a and 145a.

The May 26, 1995 Order Vacating Memorandum Opinion (Docket No. 322) and Vacating Order Regarding Admission of Trial Exhibits (Docket No. 320) of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 153a.

The June 23, 1995 Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set forth in Appellants' Appendix at App. 155a.

The August 11, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellees' Appendix at App. 1a.[1]

JURISDICTION

The Orders appealed from were filed by the three-judge District Court on April 28, 1995, May 9, 1995, and May 26, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

In Ohio, unlike many other states, the authority to reapportion following a decennial census is conferred upon an Apportionment Board (the "Board"), which acts within narrowly confined limits set by the Ohio Constitution. Ohio Constitution, Article XI. The 1991 Board consisted of Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Appellees Thomas E. Ferguson, then Auditor of the State of Ohio and Barney Quilter, then Speaker

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[1] Other prior opinions and orders in this case include *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992); *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992); *Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992).

Pro Tempore of the Ohio House of Representatives.[2] The majority members of the Board appointed James R. Tilling ("Tilling") as its Secretary; Tilling's primary function was to create a plan of apportionment.

Tilling, at the direction of the majority Board members, set about his task with the specific purpose of consciously separating voters by race by seeking to guarantee the election of new (non-incumbent) black legislators. As set forth in the Board's Findings of Fact and Conclusions of Law ("Board Findings"), adopted by the majority Board members on February 18, 1992, the Board acted under the premise that during the decade of the 1990's, some or all of Ohio's incumbent black legislators might retire, die or move on to other political posts. Board Finding No. 172, D. 147, Ex. A at 73. With that assumption as his guide, Tilling drew lines to "ensure" that a black incumbent's replacement (always assumed to be another black) would be elected. *Id.* at 71.[3]

The direct evidence that the Board, and Tilling, primarily were motivated by race in drawing district lines is overwhelming. In addition to the numerous admissions in the Board's Findings, D. 147, Tilling's handwritten

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[2] Board members Voinovich, Taft and Aronoff constitute the majority Board members; Board members Ferguson and Quilter are the dissenting Board members.

[3] The Board, in its Findings, attempted to justify its actions by relying on a regression analysis of the effect of incumbency in elections in Ohio minority districts for the years 1984, 1986, 1988 and 1990. Board Finding No. 173, D. 147, Ex. A at 73. Dr. King, Appellants' expert, found that for those years, black incumbents had an election advantage of 6-10% over non-incumbents. *Id.* To ensure that a new black candidate, running without the incumbency advantage, would be guaranteed election, Tilling drew race-based district lines calculated to provide new black candidates with election margins of not less than 68% and as high as 81%, averaging 77.6%. *Id.* at 75. Black incumbents themselves would be elected under Tilling's plan by margins of no less than 75% and as high as 89%, averaging 80%. *Id.* Tilling himself admitted that such electoral margins constitute "landslides." D. 312 at 313.

notes and maps, D. 154, Ex. 120, contain substantial direct evidence of race-based line drawing. Tilling's notes prove that Tilling began the redistricting process by displaying the minority populations of each urban county on his computer screen and drawing "minority districts" first, before attempting to ascertain which pre-existing districts could have been retained, as required by Ohio Constitution Article XI, § 7(D). D. 154, Ex. 120. For example, Tilling's notes state, with respect to Franklin County, "[a]void primarily white Bexley and Whitehall." *Id.* In Hamilton County, Tilling's notes confirm his intention to "start with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of black population, mostly City of Cincinnati." *Id.* at p. 4. In his notes regarding Summit County, Tilling's intent was to "try to maximize the minority voters in [Verson Sykes'] district." *Id.* at 6.

On November 1, 1991, Appellees commenced this action in the United States District Court for the Northern District of Ohio challenging the apportionment plan adopted by the Board on October 1, 1991.[4] D. 1. In their complaint, Appellees alleged that the Board's conscious use of race in redistricting violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.* On January 31, 1992, the District Court ruled that Amendment C violated § 2 of the Voting Rights Act. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). Specifically, the District Court concluded that there was "no legal mandate or finding of a Voting Rights Act violation to justify [Appellants'] creation of majority-minority districts wherever possible in the 1991 Apportionment Plan", and directed the Board either to show

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[4] That plan was designated "Amendment C". D. 154, Ex. 17 at 9-14.

justification for its use of race in drawing districts or to submit a revised plan within twenty days. *Id.* at 701-02.

In response to the District Court's directive, the majority Board members, on February 18, 1992, signed and submitted to the District Court their Findings of Fact and Conclusions of Law. D. 147, Ex. A. Immediately following the adoption of their Findings, the majority members of the Board also adopted Amendment D, the plan at issue in this case. *Id.* at 107. Amendment D contained "technical corrections" to the draft plan (Amendment C), and reduced the number of majority-minority districts from eight to five. *Id.*; D. 147, Ex. C at 59. However, Amendment D perpetuated the race-based redistricting of Amendment C.

On March 10, 1992, the District Court again ruled that Appellants' use of race in redistricting was not justified, and held that Amendment D violated § 2 of the Voting Rights Act and the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 737 (N.D. Ohio 1992). On appeal, this Court found that the evidence presented by Appellants failed to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986)). In that same opinion, this Court reversed the District Court's findings of violations of the Voting Rights Act and the Fifteenth Amendment, and remanded the case to the District Court for a determination of whether the plan's deviation from equal population among districts violated the Fourteenth Amendment. 113 S. Ct. at 1154.

Following remand, Appellees sought to leave to amend their complaint to challenge Appellants' admitted use of race in their plan as a violation of the Fourteenth Amendment, as recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). D. 246. Appellees' request was granted by the District Court on March 31, 1994. *Quilter*

v. Voinovich, 157 F.R.D. 36, 37 (N.D. Ohio 1994).[5] Appellees' *Shaw* claim was tried to the District Court on November 16-17, 1994. Once again, Appellants' plan was found to be unconstitutional. Specifically, on April 28, 1995, the District Court held that race was "a substantial and motivating factor" in the creation of at least House Districts 21, 22, 30, 31, 38, 39, 44 and 49, *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Apr. 28, 1995), Appellants' App. 1a at 34a, and directed Appellants to redraw those eight districts. *Id.* at 39a. Appellants filed a notice of appeal from that Opinion and Order, despite the fact that final judgment had not been entered.[6] D. 329.

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[5] Appellants, understandably displeased by this Court's holding in *Shaw*, attempted to shield their plan from review under that standard by petitioning this Court for a writ of mandamus directing the District Court to decide only the "one person, one vote" issue. However, Appellants' petition was denied. *In re Voinovich*, 114 S. Ct. 2156 (1994).

[6] Appellants have not complied with the District Court's Order. On May 25, 1995, Appellants filed a motion to stay the District Court's Order (D. 330), arguing, in part, that Appellees and the citizens of Ohio would not be injured if *yet another* election were held under an apportionment plan that has twice been declared unconstitutional. Before the District Court ruled on that motion, Appellants filed a similar motion to stay in this Court. The District Court overruled Appellants' motion to stay on August 17, 1995. D. 351.

On May 26, 1995, the District Court vacted its April 28 Opinion (D. 325, Appellants' App. 153a) and issued an amended Opinion that disposed of Appellants' erroneous (and disingenuous) argument that the Board had not drawn district lines on the basis of race but, rather, had followed the mandates of the Ohio Constitution. Appellants' App. 82a at 123a-126a and n.19. By explaining the multiple ways in which Appellants' plan violates the Ohio Constitution, the District Court exposed Appellants' argument as a sham. *Id.* Appellants requested that the District Court vacate that modified Opinion. D. 333.

On August 11, 1995, the District Court again clarified its holding by vacating its prior Opinion (D. 341) and issuing a new Opinion framing its analysis of the facts in terms of the standard

I. APPELLANTS' APPEAL DOES NOT PRESENT SUBSTANTIAL QUESTIONS

Substantial questions of law deserving of this Court's attention are not presented by Appellants' appeal. Since the last decennial census, this Court has addressed substantial issues relating to the use of race in the creation of voting districts; through those cases,[7] this Court has provided apportioning bodies with significant guidance in drawing district lines. By contrast, this Court's resolution of the questions presented by Appellants' appeal, which largely are procedural, will add little or nothing to the jurisprudence in this area.

Having made numerous admissions that many districts were drawn on the basis of race, Defendants understandably are alarmed by this Court's recent pronouncements, and are attempting to avoid the impact of those precedents by raising procedural barriers to the District Court's consideration of the merits of their plan. Appellants' appeal of these procedural issues trivializes the role of this Court.

This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, C.J., Address to the American Bar Ass'n, Sept. 7, 1949, 69 S. Ct. v, vi. Rather, "[t]he Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional

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articulated by this Court in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). D. 342, Appellees' App. 1a. In that Opinion, the District Court confirmed that, based upon the evidence presented at trial, race was the predominant factor motivating the decision of the majority Board members. *Id.* at 34a-35a. Simultaneously with the filing of this Opinion, the District Court, for the first time, entered judgment in favor of Appellees and against Appellants. D. 344.

[7] *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

questions, and other important questions of law for the public benefit." Taft, C.J., Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33, at 2 (1922). While the outcome of this case is important to the parties, and to the candidates and voters in the Ohio state legislative districts affected by the District Court's Orders, the questions that Appellants ask this Court to decide will determine the rights only of this limited group of persons and are of little or no interest to the general public.

Procedural questions such as the District Court's discretion to allow amendment of the complaint after remand, or Appellees' standing to challenge a redistricting plan that admittedly was drawn on the basis of race, present issues that are limited to the unique facts of this case. Similarly, the issue of whether, in this particular case, the constitutionality of Appellants' plan has been addressed directly by the Ohio Supreme Court (which it has not), thus requiring abstention by the District Court, does not present this Court with the opportunity to decide an issue of significant precedential value. Since this Court's resolution of the procedural issues presented by Appellants' appeal will not settle substantial questions of great or lasting importance, consideration of those issues by this Court does not constitute a wise allocation of judicial resources.[8]

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[8] It is questionable whether this appeal is from a final, appealable order. Appellants appeal from the District Court Opinions filed on April 28 and May 26, 1995. Jurisdictional Statement, pp. 6-7 n.7. Both of those Opinions have been vacated. D. 325; D. 341. Moreover, no judgment was entered by the District Court until August 11, 1995. D. 344.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLEES TO AMEND THEIR COMPLAINT TO CHALLENGE APPELLANTS' ADMITTED USE OF RACE IN DRAWING DISTRICT LINES UNDER SHAW

The District Court did not violate this Court's mandate in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), by granting Appellees leave to amend their complaint to challenge Appellants' admitted use of race in drawing voting districts as an illegal separation of voters by race under the Fourteenth Amendment, a claim recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993). Appellees' *Shaw* claim was not among the matters decided by this Court in *Voinovich*—in fact, this Court expressly declined to make such a decision, 113 S. Ct. at 1157—and, in accordance with the "mandate rule" articulated in such cases as *Quern v. Jordan*, 440 U.S. 332 (1979), and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939), the District Court could not have violated the *Voinovich* mandate when it allowed Appellees to assert that claim on remand.

In *Voinovich*, this Court did *not* consider or make any determination as to whether Appellants' plan violates the Fourteenth Amendment because the plan consciously and intentionally separates voters by race. Rather, this Court explicitly noted that a race-conscious redistricting claim under the Fourteenth Amendment had not been presented by the parties or adjudicated by the District Court, and this Court expressly disclaimed any opinion regarding the validity of such a claim. *Voinovich*, 113 S. Ct. at 1157. Appellees, of course, could not have raised a "*Shaw*" claim in the District Court; *Shaw*, which holds that the use of race in drawing voting district lines (such as Appellants admit occurred in Ohio) may violate the Fourteenth Amendment, was not decided until approximately three months after *Voinovich*.

It is axiomatic that since the claim raised by Appellees' amended complaint was not within the scope of the case when considered by this Court, that claim was not within the scope of, and was not foreclosed by, this Court's mandate on remand. With respect to the Fourteenth Amendment violation defined in *Shaw*, this Court stated in *Voinovich* (which was decided three months before *Shaw*):

> "Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, *we express no view on how such a claim might be evaluated.*"

Voinovich, 113 S. Ct. at 1157 (emphasis added).

After this Court's ruling in *Shaw*, Appellees sought leave to challenge Appellants' admitted use of race in their plan under the cause of action recognized in *Shaw*; specifically, Appellees alleged that Appellants' race-conscious redistricting violates the Fourteenth Amendment as an intentional separation of voters by race. D. 258. The District Court granted Appellees leave to file their amended complaint, *Quilter*, 157 F.R.D. at 37, and subsequently found that, based upon the overwhelming evidence that race was the primary motivating factor in the creation of Appellants' plan, Appellants' actions in fact violate the Fourteenth Amendment. Appellants' App. 1a at 38a.

As Appellants concede, Jurisdictional Statement, p. 11, the amendment of pleadings is within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971). While the District Court may not reconsider issues decided and, therefore, foreclosed by the Supreme Court, " 'on the remand a lower court is free as to other issues.' " *Quern*, 440 U.S. at 347 n.18 (quoting *Sprague*, 307 U.S. at 168). *Accord, City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341

(8th Cir.), *cert. denied*, 464 U.S. 893 (1983) ("An amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion.")

In the face of this authority, Appellants cite, out of context, the statement of this Court that it was remanding this case "only" for further proceedings on the population deviation issue. *Voinovich*, 113 S. Ct. at 1154. The District Court correctly understood this Court's use of the word "only" to mean, in context, that this Court was remanding only one of the three issues presented to it, thus foreclosing further consideration by the District Court of Appellees' Voting Rights Act claim and Fifteenth Amendment claim. As the District Court correctly noted "[t]hough it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word 'only' does not demonstrate that it meant to do so." Appellants' App. 145a at 149a.[9]

The "mandate rule" announced in *Sprague*, 307 U.S. at 168, and followed in *Quern*, 440 U.S. at 347, provides that the authority of a district court to allow a complaint to be amended following remand from a higher court is controlled by the law of the case doctrine. "As with all applications of the law of the case doctrine, the trial court may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992). Thus, under the mandate rule, the District Court could not reconsider Appel-

[9] Appellants suggest that since *Shaw* was pending before this Court at the time that *Voinovich* was decided, this Court somehow could have anticipated its future ruling and remanded this case for a determination of whether Appellants' admitted use of race in redistricting violated the principles set forth in *Shaw*. Jurisdictional Statement, p. 10. Appellants' argument that this Court could have remanded this case for further proceedings consistent with future law should be rejected.

lees' claims under the Voting Rights Act or the Fifteenth Amendment, the only claims actually resolved by this Court. However, " 'on the remand [the] lower court [was] free as to other issues.' " *Quern*, 440 U.S. at 347 n.18 (quoting *Sprague*, 307 U.S. at 168).

Appellants derive from this Court's use of the word "only" the application of some new form of *res judicata* that ascribes to the law of the case doctrine—concerning matters actually decided—the characteristics of merger and bar that might follow a final judgment. Jurisdictional Statement, pp. 9-12. What is lacking here, however, is a final judgment. It is "familiar law that only a final judgment is *res judicata*," *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916), and until there is a final judgment, the District Court's Orders remain interlocutory and subject to modification at any time, except to the extent that this Court determines particular issues upon an intervening appeal. Since this Court declined to address the *Shaw* claim (a claim that had not yet been recognized by this Court) in this case, *Voinovich*, 113 S. Ct. at 1157, the District Court did not exceed the scope of this Court's remand in proceeding to do so.[10]

This Court's mandate in *Voinovich* did not limit the District Court's inherent authority to grant Appellees' motion to file an amended complaint to assert a claim (not addressed on appeal) that Appellants' admitted con-

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[10] Appellants' reliance upon *Worley v. Columbia Gas of Ky.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) for the proposition that there is an absolute bar to amending a complaint after remand where the amendment raises issues not within the theory on which the case was tried is without merit. In *Worley*, the judgment of the district court was reversed and the case remanded with specific instructions that it be dismissed. Since the appellate court made a final disposition of the case, the district court was without authority to consider any further claims. Here, this Court did not limit the District Court's authority on remand, and the District Court did not err in allowing Appellees to amend their complaint.

scious use of race in redistricting violated the Fourteenth Amendment. Appellants' attempt to raise a procedural error where none exists is meritless, and the District Court's proper exercise of its discretion should be upheld by this Court.

III. APPELLEES HAVE SUFFERED A COGNIZABLE INJURY AND, THEREFORE, HAVE STANDING TO CHALLENGE APPELLANTS' PLAN IN ITS ENTIRETY

Since some Appellees have suffered a cognizable injury as a result of residing in districts admittedly created on the basis of race, Appellees properly may maintain this action. In *United States v. Hays*, 115 S. Ct. 2431 (1995), this Court held that redistricting legislation cannot be challenged except by persons who have suffered an injury as a result of the illegal redistricting. "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge *the legislature's action*." *Id.* at —— (emphasis added).

In *Hays*, since none of the plaintiffs resided in the single district that had been gerrymandered under the redistricting plan in question, this Court concluded that none of the *Hays* plaintiffs had suffered cognizable injury. As a result, those persons all lacked standing to challenge that redistricting plan. *Hays*, 115 S. Ct. at ——. By contrast, Appellants concede that Appellees in the present case reside in at least four out of the eight specific districts that Appellants admittedly racially gerrymandered under their plan. Jurisdictional Statement, p. 13-14. Nonetheless, Appellants make the misguided argument that Appellees have standing only to challenge the redistricting of those particular districts in which they reside. *Id.*

Appellants misunderstand the interrelationship between a plaintiff's "injury," a plaintiff's "standing," and the claim

that an injured plaintiff has standing to pursue, as articulated in *Hays*. *Hays* provides that a plaintiff who does not reside in a gerrymandered district is not injured by the gerrymander and, therefore, lacks standing to challenge the plan that contains the gerrymander. *Hays*, 115 S. Ct. at ——. Conversely, a plaintiff who resides in a gerrymandered district *is injured* by the gerrymander and, therefore, has standing to challenge *the plan* that created the injurious gerrymander.

Contrary to Appellants' argument, Jurisdictional Statement, pp. 13-14, *Hays* does not suggest that an injured plaintiff with conceded standing to challenge a redistricting plan must limit his challenge to the geographical part of the plan (*i.e.*, the district) in which he or she resides. As this Court held in *Hays*, a plaintiff who actually is injured by a redistricting plan has standing challenge the plan *as a whole*:

> "*Appellees insist that they challenged Act 1 in its entirety*, not District 4 in isolation. . . . *That is true.* It is also irrelevant. The fact that Act 1 affects all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on some Louisiana voters—that every Louisiana voter has standing to challenge Act 1 as a racial classification. *Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment,' . . . may bring such a challenge . . . .*"

Hays, 115 S. Ct. at —— (emphasis added; citation omitted). In *Hays*, none of the plaintiffs resided in the gerrymandered district and, accordingly, none had standing to challenge the plan. In the present case, Appellees reside in at least four gerrymandered districts and, therefore, have standing to challenge the plan in its entirety.[11]

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[11] If the contrary view advanced by Appellants were accepted, such that an injured party could only complain about his or her

Moreover, two of the Appellees in this case are the dissenting members of Ohio's Apportionment Board. Under the explicit terms of Ohio's Constitution, Article XI, § 1, those Appellees, as members of the Apportionment Board, are responsible for redistricting in Ohio. Where the majority members of the Board have abdicated their constitutional responsibility to the electorate of Ohio to create a lawful redistricting plan, the dissenting members have suffered a cognizable injury as a result of being unable to fulfill their duty to create legal voting districts; thus, the dissenting Board members have standing to challenge the redistricting plan in its entirety. *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state legislators have standing to challenge state court ruling invalidating statutes that the legislators wished to enforce: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974) ("[A]n individual legislator has standing to protect the effectiveness of his vote.")

Appellee Board members also have standing to remedy the injury suffered by those members of the electorate who are resident in all of the unconstitutionally drawn districts and who necessarily are injured by Appellants' illegal acts. Third-party, or *jus tertii*, standing often has been recognized by this Court where (1) the plaintiff has suffered his or her own injury-in-fact; (2) he or she has a legal relationship with the person whose additional injury is being asserted; and (3) the litigation will have

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single district in a redistricting plan, then an absurd situation would result. Under Appellants' theory, every complaint asserting a claim of impermissible race-based districting in a state's redistricting plan would have to include, at a minimum, at least one plaintiff from *every* district in the state; otherwise, there might not be a plaintiff with standing under Appellants' theory to assert that claim with respect to a particular district if evidence of racial gerrymandering in that district were uncovered during discovery. In Ohio, Appellants' theory requires that every redistricting challenge be brought by a minimum of 99 plaintiffs.

a material impact on those third-party interests. *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719-21 (1990). Where, as here, the material impact of the litigation will impact the rights of a significant segment of Ohio voters, not party to this case, recognition of standing *jus tertii* is appropriate. *Caplin & Drysdale*, 491 U.S. at 623 n.3.

Appellants' attempt to extend *Hays* to preclude a review of their race-based redistricting plan on its merits should be rejected, and Appellants' appeal should be dismissed.

IV. THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY TO APPELLANTS' PLAN BASED ON THE OVERWHELMING EVIDENCE THAT APPELLANTS DREW DISTRICT LINES ON THE BASIS OF RACE

Despite the overwhelming evidence—primarily from Appellants' own witnesses and documents—that district lines were drawn on the basis of race, Appellants attempt to justify their actions by arguing that (1) the District Court, without the benefit of this Court's opinion in *Miller*, worded its test of unconstitutionality in a manner somewhat different from the standard ultimately articulated by this Court; and (2) under the standard articulated in *Miller*, Appellants' admitted use of race in drawing district lines does not rise to the level of unconstitutionality. Both of these arguments are without merit.

The District Court, after considering the admissions set forth in the Board's Findings and Tilling's handwritten notes, correctly determined that race was *a motivating factor* in Appellants' plan. However, the District Court's formulation of this test does not suggest that Appellees did not demonstrate that race was the "predominant factor motivating the legislature's decision", *Miller*, 115 S. Ct. at ——, or that the District Court did not con-

sider Appellants' plan to be illegal under this standard. In fact, the evidence before the District Court overwhelmingly demonstrates that Appellants predominantly were motivated by race.

In *Shaw*, this Court held that "[b]y perpetuating . . . notions [of racial stereotypes], a racial gerrymander may exacerbate the very patterns of racial bloc voting that the majority-minority districting is sometimes said to counteract." 113 S. Ct. at 2827. Similarly, under *Miller*, redistricting is impermissibly race-based where "race [is] the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S. Ct. at ——.[12] That the District Court found as fact in the present case that race was "the prodominant factor motivating" the Board's line drawing with respect to eight specific districts cannot reasonably be questioned.

The "central purpose" of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States

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[12] Appellants argue that *Miller* invalidates only the "violation" of traditional districting principles. Jurisdictional Statement, pp. 17-18. Appellants confuse "subordination" with "violation." When traditional districting principles are employed to implement impermissible racial classifications, they are "subordinated" to, but not necessarily violated by, such racial considerations. This is precisely what this Court proscribed in *Miller*: " '[E]very [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate.' " *Miller*, 115 S. Ct. at —— (citation omitted). "While the boundaries . . . do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level.' " *Id.* at —— (citation omitted).

In the present case, even if Appellants did not violate the Ohio Constitution or other districting principles (which they did), they subordinated those principles to racial considerations. The evidence before the District Court overwhelmingly was that Appellants classified voters and candidates by race, and then drew the lines based upon those racial classifications.

from purposefully discriminating between individuals on the basis of race." *Shaw*, 113 S. Ct. at 2824. Racial classifications by state agencies, such as the Board, "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). The use of racial classifications also promotes "impermissible racial stereotypes" that adversely affect the proper development of our society. *Shaw*, 113 S. Ct. at 2827. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

Because of these harms, this Court views racial classifications as "presumptively invalid." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Accordingly, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. *Shaw*, 113 S. Ct. at 2825 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986)). "These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw*, 113 S. Ct. at 2825 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Given the path of this Court's jurisprudence, the District Court's conclusion that "the Supreme Court in *Reno* 'intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause,'" Appellants' App. at 12a (quoting *Shaw v. Hunt*, 861 F. Supp. 408, 429 (E.D.N.C. 1994)), was reasonable. As the District Court noted,

Appellants' App. at 16a, this Court held in *Arlington Heights* that:

> "*Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the "*dominant*" or "*primary*" one . . . When there is a proof that a discriminatory purpose has been *a motivating factor* in the decision, . . . judicial deference is no longer justified."

429 U.S. at 265-66. Thus, understandably failing to anticipate the strict scrutiny standard pronounced by this Court in *Miller* ("race as the predominant motivating factor"), 115 S. Ct. at ——, the District Court adopted as its trigger for strict scrutiny race as a motivating factor. Appellants' App. at 16a. However, the District Court's adoption of this standard does not diminish the overwhelming direct evidence that race was the predominant factor motivating the Board's actions, and the District Court's findings of fact are not inconsistent with such a conclusion.[13]

Appellants' efforts to convince this Court that the District Court had insufficient evidence of predominant racial motivation before it are ludicrous. Appellants' efforts to avoid strict scrutiny of their actions have progressed through an embarrassing and increasingly disingenuous

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[13] On August 11, 1995, the District Court modified its Opinion to aid the parties with respect to this appeal by analyzing the facts under the *Miller* standard and reaffirmed that, based upon the evidence, Appellants' plan is impermissibly race-based. The District Court concluded that, under *Miller*, "[u]sing race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court." Appellees' App. at 42a.

series of positions from "we had to use race-based lines to comply with the Voting Rights Act," to "we used race, but we had a compelling justification," to "although we may have been conscious of race, it was not the predominant motivating factor in any of our redistricting." Appellants' next argument undoubtedly will be "we were unaware that any black voters resided in Ohio."

This Court has recognized that, in most cases, it is difficult to distinguish between simple race-awareness or race-consciousness, and the use of race as a basis for governmental action. "The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Shaw*, 113 S. Ct. at 2826. In this case, however, a racial gerrymander has been established by overwhelming direct evidence. As set forth in the Board's Findings, Tilling's handwritten notes, and as reflected in the Board's implementation of its strategy of guaranteeing election of new black candidates on a county-by-county basis, Appellants engaged in race-based line drawing. Therefore, the District Court did not err in ordering Appellants to remedy Appellees' injury by redrawing those districts that violate the Fourteenth Amendment.

Appellants attempt to dismiss the extensive admissions of race-based districting contained in Tilling's handwritten notes, and in the Board's Findings, as the "only two items" of " 'direct evidence' " that the District Court could cite to establish racial gerrymandering. Jurisdictional Statement, p. 18. Those "two items" constitute direct evidence of Appellants' conscious separation of voters by race.

Appellants argue that Tilling's handwritten notes are "completely irrelevant" because they relate to Amendment C. *Id.* at 18-19 and n.18. Appellants do not inform the Court that the unconstitutional line drawing in the challenged plan (Amendment D) was derived from

the draft plan (Amendment C). Tilling's race-based lines in Amendment C (as shown by his notes) were not abandoned or replaced by the adoption of Amendment D.

Appellants also argue that the Board's Findings are similarly irrelevant because they "merely constitute a *post hoc* rationalization for the plan eventually adopted." Jurisdictional Statement, p. 19. What Appellants euphemistically call a "*post hoc* rationalization" is a signed document that spells out the numerous ways in which Appellants based their plan on the race of voters and candidates in order to ensure that black candidates would be elected or re-elected by black voters. In other words, Appellants' "*post hoc* rationalization" is in fact a lengthy and detailed admission of impermissible race-based districting. Based upon the overwhelming evidence that Appellants primarily were motivated by race in creating their plan, Appellants' appeal should be dismissed.

V. APPELLANTS HAD NO COMPELLING INTEREST FOR THEIR ADMITTED USE OF RACE IN DRAWING DISTRICT LINES

Appellants ironically attempt to justify their admitted use of race in drawing district lines by stating that they believed (erroneously) that they had to draw race-based lines in order to comply with the Voting Rights Act, and that this erroneous belief constituted a compelling interest that somehow sanitized their race-based districting plan. However, this Court's decisions in *Voinovich* and *Miller* show that this argument is fatally defective.

The District Court found in 1992 that in Ohio "[t]he totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population." *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). The District Court further found that "substantial coalitional voting between the races exists in Ohio, where white crossover

voting contributes to the election or reelection of all eleven of the black Ohio state legislators." *Id.* at *8. On appeal, this Court concurred that the evidence in this case fails to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich*, 113 S. Ct. at 1158.

Although Appellants concede this shortcoming in their argument, Jurisdictional Statement, p. 23, they assert that race-based line drawing was permissible because the Board feared lawsuits seeking to compel it to comply with the Voting Rights Act. *Id.* The issue, of course, is not whether a plaintiff could *file* a lawsuit against the Board, but whether such a plaintiff could *prevail*. As this Court has pointed out, a lawsuit against the Board for violations of the Voting Rights Act, as a matter of law, could not have succeeded. *Voinovich v. Quilter*, 113 S. Ct. at 1157-58. Accordingly, compliance with the Voting Rights Act is not a justification for Appellants' admitted use of race.

Faced with a similar argument, the *Miller* Court stated:

> "[W]e do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. 'The history of racial classifications in this country suggests that *blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.*'
>
> * * *
>
> Georgia's drawing of the Eleventh District was not required under the [Voting Rights] Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5."

Miller, 115 S. Ct. at ——. Accordingly, Appellants' attempt to create a compelling state interest in the conscious separation of voters by race should be rejected by this Court.

VI. THERE WAS NO PROCEDURAL BAR TO THE DISTRICT COURT'S DETERMINATION THAT APPELLANTS' PLAN IS UNCONSTITUTIONAL

In a final attempt to create a procedural bar to the review of their plan on its merits, Appellants argue that 28 U.S.C. § 1738 somehow requires the District Court to "defer" to the Ohio Supreme Court's judgment in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992) (per curiam), even though *Ferguson* did not address the constitutionality of Appellants' plan. Under this same faulty logic, Appellants also assert that the District Court erred in failing to abstain from determining any state law issues in the course of this redistricting challenge. Appellants' arguments are without merit.

The inconsistencies in Appellants' *Ferguson* arguments highlight their flawed reasoning. For example, Appellants attempt to distance themselves from the "smoking guns"—Tilling's notes of his line-drawing process and the Board's Findings—by arguing that the notes and the Findings are "completely irrelevant," Jurisdictional Statement, p. 19, since they refer to a draft plan ("Amendment C"), rather than the plan finally adopted and currently at issue in this litigation ("Amendment D"). However, Appellants also argue that the District Court's consideration of Amendment D is foreclosed by *Ferguson, even though the Ferguson court only had before it and could only have ruled upon Amendment C.*[14]

Further, Appellants argue that Appellees lack standing to assert a claim of unconstitutional race-based districting, despite Appellants' admitted use of race in drawing district lines, because no Appellee resides in some of

[14] *Ferguson* was submitted on February 10, 1992 and decided on February 14, 1992, during the period that various drafts of the 1991 redistricting plan were being considered and modified by the Board. Amendment D was not adopted by the Board until February 18, 1992, four days *after* the *Ferguson* decision. Jurisdictional Statement, p. 19 n.18.

the unconstitutional voting districts. Appellants then turn around and argue that *Ferguson* somehow validated Appellants' plan in its entirety, even though the only districts represented by litigants in *Ferguson* were Senate District 32 (the only district whose validity actually was ruled upon) and the adjoining Senate District 22. *Ferguson*, 63 Ohio St. 3d at 198. Once again, Appellants cannot have it both ways.

Passing the inconsistencies in Appellants' various arguments, however, the fact remains that *Ferguson* did not limit the District Court's authority to address the constitutionality of Appellants' plan.

Appellees did not ask the District Court to review the Ohio Supreme Court's decision in *Ferguson* because the Ohio Supreme Court did not find in *Ferguson* that Appellants' plan meets the requirements of Article XI of the Ohio Constitution. In *Ferguson*, the Ohio Supreme Court held only that Senate District 32 meets the requirements of § 4 of Article XI of the Ohio Constitution. *Ferguson*, 63 Ohio St. 3d at 200 ("Plaintiffs and defendants and counterclaimants Henry and Drake raise the issue of the constitutionality of Senate District 32. . . . The court finds against the counterclaimants *on their claim* that the plan is unconstitutional . . .")

The concurring and dissenting Justices agreed that the only issue decided by the *Ferguson* Court was whether Senate District 32 meets the requirements of the Ohio Constitution. "[T]he only justiciable issue remaining in plaintiffs' amended complaint is the dispute regarding Senate District 32 and House District 68 and the inconsistency between Sections 3, 4, 8 and 11 of Article XI. . . . There is no other justiciable issue or controversy before us. . . . For the foregoing reasons, I conclude that Senator Henry's counterclaim challenging the constitutionality of Senate District 32 is not well taken." *Id.* at 201-02 (Moyer, J., concurring). "[T]he sole issue remaining in this case is whether the 1991 apportionment plan is con-

stitutional with respect to the composition of the 32nd Senate District." *Id.* at 212 (Douglas, J., concurring). The court "brushed aside all other issues" except "the one raised in Senator Henry's counterclaim." *Id.* at 215 (Resnick, J., dissenting).

Appellees do not challenge the Ohio Supreme Court's decision regarding the constitutionality of Senate District 32. Appellees raise a different issue—whether Amendment D as a whole meets the requirements of Article XI, § 7 of the Ohio Constitution (which it does not). The Ohio Supreme Court did not determine this issue, and, in fact, did not even discuss the application of § 7 in *Ferguson*. Moreover, the Ohio Supreme Court addressed the validity only of Senate District 32 in Amendment C. Amendment D, which is challenged by Appellees, was not in existence at the time the Ohio Supreme Court made its ruling. The Ohio Supreme Court, then, has not ruled, and could not have ruled, directly or indirectly, on the constitutionality of Appellants' plan.

Appellants' further arguments, that the District Court was compelled to abstain from consideration of the requirements of the Ohio Constitution in hearing Appellees' redistricting challenge, Jurisdictional Statement, pp. 24-28, are misplaced. As stated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" (citations omitted).

Growe v. Emison, 113 S. Ct. 1075 (1993), upon which Appellants primarily rely, is inapposite. *Growe* requires deference to ongoing parallel state court litigation in certain circumstances. *Id.* at 1077, 1080-83. However, *Ferguson* was neither parallel nor ongoing at the time of the proceedings in the District Court from which this appeal is taken. Rather, *Ferguson* concerned only the consti-

tutionality of Senate District 32 (a matter neither presented to nor considered by the District Court at any time), and *Ferguson* was concluded long before any of the decisions now appealed by Appellants were rendered by the District Court.

Appellants' remaining generalized reliance, in a footnote, upon the abstention doctrine articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), Jurisdictional Statement, p. 27 n.21, also is unavailing. Since redistricting almost always involves consideration of state legislative (or, in Ohio, state constitutional) requirements, Appellants' application of *Burford* would effectively foreclose *any* federal court review in every case because it could always be said that state redistricting law and policies, and "[t]he entire electorate of the State . . . and all its elected representatives are potentially affected." *Id.* Appellants' abstention arguments are without merit, and their appeal should be dismissed.

CONCLUSION

For the reasons set forth above, Appellants' appeal should be dismissed, and the Opinions of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest for using race as the predominant factor in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board [2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting

[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.*

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision

in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower court, we are bound of course, regardless of the strength of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was

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[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627, 1995 WL 382080 (U.S. June 29, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]; Supp. Dissenting Op. at [2 n.3]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D.

accordingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been decided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw*. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]; Supp. Dissenting Op. at [2 n.3]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

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purported, but sham, necessity of creating such districts as the basis for ignoring the traditonal anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls. Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

II. First Principles

A. Nature of a Shaw v. Reno Claim

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those case by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *probable jurisdiction noted*, 63 U.S.L.W. 3916 (U.S. June 29, 1995) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828; *Miller v. Johnson*, Nos. 94-631/797/929, 1995 WL 382020, at *23 (U.S. June 29, 1995) (Ginsburg, J., dissenting). In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828; *Miller*, 1995 WL 382020, at *3. The Court defined such a deliberate and arbitrary distortion of district boundaries for racial purposes as a "racial gerrymander."[10] *Reno*, 113 S. Ct. at 2823.

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[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has

The *Reno* Court reasoned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part). These observations were reiterated in the Court's recent decision in *Miller v. Johnson*:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

1995 WL 382020, at *7 (citations omitted).

For these reasons, the Court has held that racial gerrymandering by state legislatures demands close judicial scrutiny; thus, a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Reno*, 113 S. Ct. at 2825, 2826, 2830; *Miller*, 1995 WL 382020, at *3, *7, *13; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict

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never recognized that someone deliberately can act in an arbitrary manner.

scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the *Reno* Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *see also Miller*, 1995 WL 382020, at *3 (noting that racial and ethnic distinctions of any sort are inherently suspect and require exacting judicial scrutiny regardless of the race of those burdened or benefited by the classification).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (2) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify

race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? Some of these questions were answered subsequently in the Court's *Miller* decision. We turn now to consider these issues.

B. Bizarre District Shapes: A Necessary Element?

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are " 'bizarre' or 'irregular.' " Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element or a threshold requirement to state a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession,

bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

The validity of this reasoning was recently confirmed by the Court in *Miller*:

> Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, 509 U.S., at —— (slip op., at 17), a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

1995 WL 382020, at *8. Thus, "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold

showing of bizarreness" in order to state a valid *Shaw v. Reno* claim. *Miller*, 1995 WL 382020, at *9.

Now that we have discussed the types of evidence that a party can marshall to sustain a *Shaw v. Reno* claim, we turn to consider both the extent to which race must be a factor in an apportionment plan before the plan becomes a racial gerrymander subject to strict scrutiny and the party that bears that burden of proof.

C. The Trigger for Strict Scrutiny

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander requiring close judicial scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original).

In *Miller v. Johnson*, the Court clarified the burden of proof necessary to trigger strict scrutiny:

> Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. . . . The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the leg-

> islature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district had been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphasis added).

Despite this clarification, there remains some ambiguity regarding the *Miller* "predominant factor" test. Specifically, what did the majority mean when it said that a plaintiff must prove that the legislature "subordinated" traditional districting principles to racial considerations in order to trigger strict scrutiny? Does this mean that a plaintiff must prove that the legislature disregarded or abandoned traditional districting principles in favor of racial considerations or does it mean that strict scrutiny will be triggered even if a state legislature follows traditional districting principles, simply because those principles were accorded less emphasis or less weight than racial considerations?

The ambiguity inherent in the *Miller* Court's predominant factor test is highlighted by the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Ginsburg. Although no other justice joined her opinion, Justice O'Connor wrote separately to emphasize her understanding of the Court's predominant factor test:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke

> strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard* of customary and traditional districting practices.

Miller, 1995 WL 382020, at *17 (O'Connor, J., concurring) (citation omitted and emphasis added). Justice Ginsburg in dissent, joined by Justices Stevens, Breyer, and Souter, interpreted the Court's new predominant factor test differently:

> Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominantly motivated" by race: "strict scrutiny" will be triggered not only when traditional districting practices are *abandoned*, but also when those practices are *"subordinated to"—given less weight* than race. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices.

Id. at *21 (Ginsburg, J., dissenting) (citation omitted and emphasis added).

The majority, itself, recognized, as it had in *Shaw*, 113 S. Ct. at 2827, that a legislature's compliance with traditional districting principles may well suffice to defeat a claim of racial gerrymandering, but such a refutation was not possible in *Miller* because the Court found that the State of Georgia had subordinated those factors to racial objectives. *Miller*, 1995 WL 382020, at *12. As proof of subordination, the majority pointed to an objection of Georgia's Attorney General that was lodged with the Justice Department in response to the Justice Department's demand for three majority-black districts in Georgia. *Id.* The State Attorney General claimed that to comply with such a demand the State would have to " 'violate all reasonable standards of compactness and contiguity.' " *Id.* The Court found such a statement to

be "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority black districts." *Id.* Nevertheless, a fair interpretation of this language does not lead to the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations. In fact, as Justice Ginsburg pointed out in dissent, Georgia's Eleventh District, which the majority held to be an example of "subordination," actually bore "the imprint of familiar districting practices." *Id.* at *21 (Ginsburg, J., dissenting); *id.* at *24-25 (Ginsburg, J., dissenting) (noting specifically how the Eleventh District's design reflects the significant consideration of traditional districting factors).

Moreover, the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. The presupposition of such a conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by racial considerations at the same time. Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Court. *See Reno*, 113 S. Ct. at 2816.

Taken together, all of this language leads us to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies traditional districting principles and

gives them less weight in the apportionment process than racial considerations.

Although the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding, *see id.* at *10; *Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78, if the Plaintiffs offer proof substantiating that race was the predominant factor motivating the state's apportionment process, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest, *see Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

D. Compelling State Interest

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants in this case had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a predominant factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means

chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.*; *see Miller*, 1995 WL 382020, at *13. Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action ostensibly in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Miller*, 1995 WL 382020, at *13; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to

eradicate the effects of past racial discrimination. *Miller*, 1995 WL 382020, at *13 (citing *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82)). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14; *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate

> the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994), *aff'd*, 1995 WL 382020 (U.S. June 29, 1995).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440.

E. Narrowly Tailored

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court

provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* court that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45.

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that were less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether

a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything

other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* court that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence

is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[11] *Id.* at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995). Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all

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[11] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

rights." The issue presented in this case must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are deliberately and purposefully packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that racial considerations were the predominant factor in the Defendants' 1992 reapportionment plan:

1. The Plaintiffs' claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts,

which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[12] in support of the 1992 plan, reveal not only that race was a substantial and motivating factor in the reapportionment process but that it was the predominant factor in certain house districts. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose only a black candidate as their representative. This is clearly one of the demeaning and offensive assumptions that the Supreme Court has previously criticized as an impermissible racial stereotype. *See Miller*, 1995 WL 38220, at *7 (citing *Reno*, 113 S. Ct. at 2827).

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on

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[12] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68% (40.98% black voting age population), a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21

under the 1992 plan, was increased from 46.80% to 54.30% (48.30% black voting age population), an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99% (46.42% black voting age population), an increase of 8.29%. Defs.' Supp. Exs., Vol I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution," Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07% (39.86% black voting age population), an increase of 7.67%, Defs.' Supp. Exs., Vol I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47% (41.56% black voting age population), an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69% (36.71% black voting age population), an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates.

The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16% (43.13% black voting age population), an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98% (52.72% black voting age population), an increase of 2.78%

in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his predominant use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the heightened attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants

contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' predominant consideration of race in the redistricting process. The fact remains that a not-too-distant forerunning of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.[18]

12. At this point we note that for purposes of this case, we assume without holding that the Apportionment Board substantially complied with the traditional districting principles mandated in Article XI of the Ohio Constitution. Based on our earlier analysis of the *Miller* Court's predominant factor test, *see supra* part II.C., we find it unnecessary to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution because even if a state substantially adheres to traditional districting principles, a plaintiff can still prove that racial objectives were the predominant factor in the apportionment process if tra-

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[13] Originally, the dissent agreed that the notes of Tilling "strongly suggest[ed] that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A. ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. In light of the Supreme Court's adoption of the predominant factor test in *Miller*, however, the dissent has changed its position and decided that Tilling's notes are not sufficient to trigger strict scrutiny. Supp. Dissenting Op. at [5 & n.4]. Nevertheless, the dissent continues to ignore totally the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's Findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., ¶¶ 4-10.

ditional districting principles were subordinated to—given less weight than—racial considerations. *See Miller*, 1995 WL 382020, at *10; *id.* at *21 (Ginsburg, J., dissenting). Nevertheless, we note that the Board's compliance with the traditional districting principles in the Ohio Constitution is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702.[14]

13. Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none

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[14] Were we to decide to consider this issue, however, we note that as a preliminary matter we would have to decide whether this court was precluded from addressing the constitutionality of the 1992 plan under Article XI of the Ohio Constitution because of the Ohio Supreme Court's previous decision in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam). Ultimately, under the Ohio Constitution, the Ohio Supreme Court held the following: "The court finds against the counterclaimants on their claim that the plan is unconstitutional and, accordingly, we find the plan to be constitutional." *Id.* at 1022. Nevertheless, careful examination of the per curiam opinion reveals that the court was specifically addressing the constitutionality of Senate district 32 under sections 4, 9, and 11 of Article XI of the Ohio Constitution. Thus, Plaintiffs in the instant case argued before this court that the Ohio Supreme Court did not rule on the constitutionality of the challenged house districts under sections 7 and 10 of Article XI of the Ohio Constitution and that this court, accordingly, was not precluded from addressing the issue. The Defendants, however, have argued that this court is precluded from addressing the constitutionality of the reapportionment plan under the Ohio Constitution because the Ohio Supreme Court specifically stated that "the plan" was constitutional, meaning the whole plan.

of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and accompanying maps, clearly reveal that the Defendants intentionally crafted these eight districts with the predominant purpose of separating voters on the basis of race.

14. Because race was the predominant motivating factor in the drafting of these eight districts in the 1992 plan, they must be subjected to strict scrutiny analysis. *Miller*, 1995 WL 382020, at *13. Thus, the burden of production shifts to the Defendants to show that House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan were narrowly tailored to meet a compelling state interest. *See id.; Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

15. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

16. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

17. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

18. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

19. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord, App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of

> Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14. Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elections.[15]

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[15] We note, however, one exception. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two districts.

20. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the eight districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this

information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act in the eight challenged districts. Significant evidence of white majority bloc voting in these Ohio legislative districts did not exist.

21. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[16] *See Miller*, 1995 WL 382020, at *13 ("As we sug-

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[16] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house districts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitute a compelling state interest to justify the Board's racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation previously was found in another district in a different part of the State.

gested in *Shaw*, compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Hunt*, 861 F. Supp. at 440.

22. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[17] we conclude that these districts violate

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[17] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. Obviously, such a conclusion is based on the presumption that the Board adhered to the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Although the dissent finds that the Board did comply with the districting principles in the Ohio Constitution, as we noted earlier the latter conclusion is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702. Because the Defendants, themselves, did not chose to proffer such a compelling justification for their racial gerrymandering, we again find it unnecessary to address the specific issue whether the Board complied with the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Nevertheless, we offer two observations regarding the broader issue whether, assuming without holding that the Board did comply with the Ohio Constitution, such compliance could serve as a compelling state interest that would justify the Board's racial gerrymandering in the 1992 plan.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even

the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnec-

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the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest, we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for such remedial action. *See supra* part II.D. Compliance with the Voting Rights Act, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed with the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is logically unsustainable.

essary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Jusice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson,* 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting generally had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high

degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge